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No. 08-313

SEP 23 2008

In The

Supreme Court of the United States

EUGENIO NAVARRO,

Petitioner,

v.

BRONEY AUTOMOTIVE REPAIRS, INC., STEPHEN BRONEY, TILDEN TOTAL CAR CARE CENTER, ANTHONY BROWN,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Although the Eleventh Circuit decided this case consistent with sixty-five (65) years of jurisprudence regarding individual coverage under the Fair Labor Standards from this Court – the test for such coverage is whether the employee's activities constitute participation in the actual movement of persons or things in interstate commerce, as opposed to "merely affecting" interstate commerce (*e.g.*, *McLeod v. Threlkeld*, 319 U.S. 491 (1943) (holding that the test to establish individual coverage under the FLSA is "not whether the employees activities merely affect or indirectly relate to commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it") and *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943) (holding that "Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states" and did not "exercise in this Act the full scope of the commerce power")) – should this Court grant a *certiorari* petition and enter a ruling inconsistent with its established precedent, or should the Court revisit its established precedent in this area and reverse it (for seemingly no good reason other than to allow the petitioner to recover under the FLSA)?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Broney Automotive Repairs, Inc. does not have a parent corporation or subsidiary corporation and there is no publicly held company that owns 10% or more of its stock. It is a small, family-owned company owned by Respondent Romney.

Respondents Stephen Romney and Anthony Brown live in Broward County, Florida and own and operate a car repair shop, the Respondent Broney Automotive Repairs, Inc.

Respondent Tilden Total Car Care Center was not served in this lawsuit, and is not represented by counsel representing the other Respondents.

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INTRODUCTION

Petitioner has presented no "compelling reason" for his Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eleventh Circuit's opinion in this case ("Opinion") is in conflict with a decision of this Court, and Petitioner makes no argument that the Eleventh Circuit's decision is in conflict with a decision of another Court of Appeals or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a-c). While the Petition does argue that the Opinion is in conflict with a prior decision of this Court, it is not. *See, e.g.*, *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71 (1943); *Kirschbaum Co. v. Walling*, 316 U.S. 522, 523 (1942). *McLeod*, *Jacksonville Paper Co.*, and *Kirschbaum Co.* are a triumvirate of cases that require the conclusion that the Petition is in fact frivolous.

The "Question Presented" section of the Petition suggests that the Opinion's holding uses the wrong test for individual coverage, as the Petition claims that the Opinion, in concluding individual coverage was not applicable to Petitioner, wrongly "conclude[ed] that petitioners [sic] activities merely affected and did not sufficiently affect interstate commerce" under the FLSA, as if that is not the correct legal standard. In the Petition's "Relevant Provisions Involved" section, it quotes the language

from 29 U.S.C. § 207(a)(1) which states that individual coverage exists for employees who are "engaged in commerce".

The Petition's arguments that the Opinion does not cite the correct legal standard are entirely misplaced (and are misleading) because this Court has previously interpreted the "engaged in commerce" language from § 207(a)(1) to mean that employees that are entitled to invoke individual coverage may do so if their work is "in the 'channels of interstate commerce,' *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, 335, 87 L.Ed. 460, as distinguished from those who[se work] merely affected that commerce." *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (interpreting the phrase "engaged in commerce" to such extent as to be a veritable treatise concerning that phrase contained in § 207(a)(1)). Indeed, *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71 (1943) (quoting *Kirschbaum Co. v. Walling*, 316 U.S. 522, 523 (1942)), holds that the FLSA does not apply "to business or transactions 'affecting commerce'". This Court in *McLeod* framed the test as follows:

> The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.

McLeod, 319 U.S. at 497. Thus, the Opinion in this case directly followed the language from controlling precedent from this Court. The *McLeod* case is the exact case that the district court relied on in this case. *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008) (citing *McLeod*, 319 U.S. at 491). The Opinion cites from *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1267-68 (11th Cir. 2006), which cites the same standard and relies on the *McLeod* case for that standard; thus, the Opinion appropriately relies on controlling precedent of this Court. Petitioner does not argue his work was in the channels of commerce, nor could he.

In *McLeod*, this Court noted that the definition of goods contained in § 203(i) specifically "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." *McLeod*, 319 U.S. at 494. Thus, the Court held that therefore "handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are all in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not." *Id.* at 494. This law is nothing new to the Petitioner, as it was relied upon by the district court in this case. *Navarro*, 533 F.Supp.2d at 1223 (citing *McLeod*, 319 U.S. at 491). Thus, it is not clear why this Petition was ever filed in the first instance, since the goods in this case handled by Petitioner were obtained from retailers.

The Petition further argues that "Petitioners [sic] regular job duties, involved the pick-up and delivery of auto-parts [sic] from various auto parts suppliers that were manufactured outside the state of Florida. [Petitioner] also regularly installed those auto-parts [sic] into [Respondent's] customers' vehicles who where [sic] the ultimate consumers." (*Pet.* at 2). The point-heading in the "reasons for granting the Petition" section of the Petition argues that "the interstate journey of goods does not cease to flow in commerce until the goods have reached their final destination and therefore all individuals who handle these goods during flow [sic] through commerce are individually covered". (*Pet.* at 3).

These two arguments are contrary to prior Supreme Court precedent, as stated above, because goods are no longer in the stream of commerce for purposes of individual coverage under the FLSA once the goods wind up in the hands of the local retailer. The ultimate consumer is the Respondent because it bought the auto parts from a local retailer, because this Court has previously held that goods lose their interstate status and are "at rest" by the time the retailer receives them. *McLeod*, 319 U.S. at 494 (acknowledging so); *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1095 (5th Cir. 1973) (interpreting the holding of *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943) to be as follows: "the Court ruled that the interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce, until they reached their final destination – the retail

stores"). Accordingly, contrary to the Petitioner's arguments, precedent going back sixty-five (65) years holds that goods that once may have had an interstate nature lose that status by the time the local retailer receives them. *Id.*; *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008) (citing *McLeod*, 319 U.S. at 491).

The Petitioner's next argument is that "any regular contact with commerce, even if it is small, will result in an employee being covered by the FLSA. No de minimis rule applies." (*Pet.* at 6) (citing *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1124 (5th Cir. 1979)). That is contrary to this Court's prior precedent, as this Court has specifically held before that individual coverage is applicable only "[i]f a substantial part of an employee's activities related to goods whose movement [was] in the channels of interstate commerce. . . ." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943). Recently, this "substantial part" language has been interpreted by the courts and the Department of Labor to mean that an employee seeking to invoke individual coverage must *regularly and recurrently* be engaged in interstate commerce. *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006) (citing 29 C.F.R. § 776.23(d)(2) & .24).

The Petitioner's next argument is that the FLSA is a remedial statute that is to be construed broadly. It is not clear if the FLSA qualifies as a remedial statute, as it was enacted during the depths of the great depression to give incentive to employers to

spread work around to reduce the unemployment rate. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948) (finding that the FLSA was enacted "to spread employment through inducing employers to shorten hours [for existing workers] because of the pressure of the extra costs [– the payment of overtime – which would require the employer to hire additional workers]."). To the extent that the individual coverage should be construed broadly, it is only to be construed broadly within the test enunciated by this Court as identified herein. Apparently, the Petitioner is seeking this Court to reverse sixty-five (65) years of settled law on this issue, and create a whole new jurisprudential test in pursuance of a general axiom that the Court should construe the statute broadly. The Court should, obviously, reject that invitation, because to entertain it would flummox businesses in their attempts to comply with the FLSA, by changing settled law in such a manner.

The Petitioner sets forth that in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943), this Court stated that "[i]t is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." The Court should note that the *Jacksonville Paper Co.* is referring to the actual channels of commerce, which are not at issue here, as Petitioner did not work in one. That case also held that Congress did not intend to use its full commerce clause power for employees who were neither working in the channels of interstate commerce nor working

with an instrumentality of commerce, but rather Congress "plainly indicated its purpose to leave local business to the protection of the states" and that "Congress did not exercise in this Act the full scope of the commerce power." *Id.* at 570. The *McLeod* decision, as stated above, discusses this concept further, and also holds that Congress did not exercise its full commerce power in enacting the statute. That is why the test for individual coverage requires an employee seeking to invoke it to show that his or her activities did more than just "affect" commerce.

STATEMENT OF THE CASE

On April 16, 2007, Petitioner filed a Complaint in the United States District Court for the Southern District of Florida, bringing one substantive count for overtime, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (R1). Later, an Amended Complaint was filed. (R20). Discovery ensued, and the Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Request to Convert into Motion for Summary Judgment, when it became clear that no jurisdiction existed in the case. (R27). Shortly thereafter, the Defendants moved to stay the case, because it was evident that there was no subject matter jurisdiction. (R30). The Court granted the Motion for Stay, (R37), but despite the stay, the Petitioner filed his own Motion for Partial Summary Judgment, as to jurisdiction. (R38). Petitioner's counsel filed a similar motion

for summary judgment in another case, *Casanova v. Morales*, 2007 WL 4874773 *1 (S.D. Fla., Aug. 3, 2007), *aff'd*, ___ F.3d ___, 2008 WL 94756 (11th Cir. 2008), which was denied by the same district court judge that decided this case and affirmed by the Eleventh Circuit. The district court converted the motion into a summary judgment motion, and provided the Petitioner with additional time to respond, after the motion was fully briefed, but the Petitioner failed to submit any additional evidence or argument. (R50n.4).

In response to the Defendants' Motion for Summary Judgment, contrary to the testimony in Petitioner's deposition (and argued in the Petition), Petitioner submitted an affidavit in which he averred that he picked up parts from local retail auto parts stores (in his deposition he stated that all he did was install the parts and clean the shop on occasion). (R44). The Court denied the Petitioner's Motion for Partial Summary Judgment, but granted the Respondents' Motion for Summary Judgment, based on the clear binding precedent of *Thorne v. All Restoration Inc.*, 448 F.3d 1261 (11th Cir. 2006), *McLeod v. Threlkeld*, 319 U.S. 491 (1943), and other cases. (R50). Thereafter, the district court entered a Final Judgment in Defendants' favor. (R51). Petitioner's Appeal followed (R52), and the Eleventh Circuit affirmed in an unpublished opinion. *Navarro v. Broney Automotive Repairs, Inc.*, 2008 WL 2315869 (11th Cir., June 6, 2008).

The facts of this case are largely set forth in the published opinion *Navarro v. Broney Automotive Repair, Inc.*, 533 F.Supp.2d 1223 (S.D. Fla. 2008). The corporate Defendant is an automobile repair shop. (R27-4). The business was created in October, 1999. (R27-4). It is a mom-and-pop shop owned by Defendants Stephen Romney and Anthony Brown. (R27-4). Petitioner began working for the Respondents in September, 2004, and continued working there through April 9, 2007. (R27-4). Petitioner was hired as a "helper". (R27-4). Petitioner testified that when he was hired, he understood that his duties were to help work on the cars in any way that he might be asked, such as to exchange an alternator, starter motor, radiator, or transmission. (R27-4). Petitioner basically fixed and replaced parts. (R27-4). Romney described Petitioner's job duties similarly, and testified Petitioner performed oil changes, brake pad changes, took parts off, and put parts back on, "[b]asic stuff, very basic." (R27-4).

Petitioner testified in his deposition that he did not order parts for the business or have any direct dealings with customers. (R27-4). Specifically, Petitioner never received any payments from the customers or in any way dealt with credit cards. (R27-4). If Petitioner worked on a vehicle, and his work required that a new or replacement part be ordered, Petitioner would tell Defendant Bromney, and Bromney would order the part. (R27-4).

Romney orders his parts from Bennett Auto Supply, a local auto parts supplier located at Dixie

highway in Fort Lauderdale. (R27-4). Romney also orders some parts from other automotive retailers, such as Auto Zone, Pines (Auto Parts), and some local dealerships. (R27-4). The parts were always delivered to Romney's shop by the auto parts suppliers, typically within one hour after the order was placed. (R27-5). Petitioner testified very clearly that he worked on the cars in any manner that was asked of him by Mr. Romney and/or Mr. Brown, and he specifically identified replacing alternators, starter engines, radiator, and transmissions. (R36-2). Petitioner testified that sometimes he would diagnose what was wrong with the cars, but that he did not deal with front office paperwork, did not deal with the customers, did not order parts, and did not deal with customers. (R36-2). After listing these duties (and non-duties), Petitioner plainly testified that there were no other tasks that he performed, as follows:

> Q: Other than the job duties that we discussed, are there any other job duties other than, basically, removing parts or replacing parts on the vehicles? Anything else that I'm missing that you did on a daily basis?
>
> A: When there was nothing to do just to clean the area.
>
> * * *
>
> Q: Any other job duties at Broney that we haven't mentioned already that you did other than the cleaning up when there

was slow times, and the fixing and replacing of parts?

A: No.

(R36-2). Nevertheless, despite this clear description of his job duties, Petitioner submitted an affidavit in opposition to Defendants' Motion for Summary Judgment listing other job duties. In his affidavit, Petitioner claims that he went and picked up parts from local auto parts stores. (R35; *Aff. of Navarro* ¶ 9). The district court, believing that picking up the auto parts has no bearing on whether the Petitioner can invoke individual coverage, accepted the testimony, and assumed for purposes of its opinion that the Petitioner picked up parts from the local retailers that the Defendants had purchased, despite a considerable body of precedent that parties are not supposed to submit affidavits inconsistent with their previously given deposition testimony to thwart summary judgment. *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003).

Plaintiff cannot dispute that the corporate Defendant only earned $277,278 in the tax year October 1, 2005 to September 30, 2006. (R27-4). Additionally, from 2004 – 2007, Plaintiff cannot rebut that the corporate Defendant's gross revenue was under $500,000 annually. (R27-4). In fact, from the last two quarters of 2003 to the present, the corporate Defendant has never had a quarter in which gross revenue exceeded $125,000, and never had four consecutive quarters in which gross revenue exceeded $500,000

annually. (R27-4). These facts made the Petitioner concede below that there was no enterprise coverage, see *Navarro v. Broney Automotive Repairs, Inc.*, 533 F.Supp.2d 1223, 1224 (S.D. Fla. 2008) (noting that "Navarro concedes that he cannot prove enterprise coverage because Broney Automotive's gross income during the relevant period is less than $500,000"), but Petitioner improperly suggests in a footnote that there may be enterprise coverage. (*Pet.* at 3 n.1). Petitioner's concession of this point below makes that issue not appealable. *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1354 (11th Cir. 1998) (holding that points waived below are not appealable).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WAS DECIDED CONSISTENT WITH ESTABLISHED PRECEDENT OF THIS COURT AND OF THE ELEVENTH CIRCUIT, AND THEREFORE THE PETITION SHOULD BE DENIED.

Section 207(a) of the FLSA provides, in relevant part:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer

> than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). This Court has expressly held that the "engaged in commerce" term in § 207(a)(1) means that to invoke individual coverage an employee must show more than that they merely affect interstate commerce, but rather must show that they significantly affect it, that is, actually be involved in it. *McLeod v. Threlkeld*, 319 U.S. 491, 493-94 (1943) (interpreting the phrase "engaged in commerce" to such extent as to be a veritable treatise concerning that phrase contained in § 207(a)(1)). The *McLeod* case, which was decided shortly after *Walling v. Jacksonville Paper Co.*, requires the conclusion that *certiorari* should not be granted by this Court, as there is nothing for it to decide.

Nevertheless, Respondents will address several arguments made by the Petitioner. Simply put, the FLSA requires an employer to pay overtime at a rate of one and one-half the employee's regular rate for all time worked over 40 hours in a week. These FLSA overtime provisions apply in two circumstances: (1) where an employee is engaged in commerce or the production of goods for commerce – individual coverage; or (2) where an employee works for an enterprise engaged in commerce or in the production of goods for commerce – enterprise coverage. *Ares v. Manuel Diaz Farms, Inc.*, 318 F.3d 1054, 1056 (11th Cir. 2003).

"The burden of proof lies on employees to establish that they were engaged in interstate commerce, or in the production of goods, and that such production was for interstate commerce." *Kitchings v. Florida United Methodist Children's Home, Inc.*, 393 F.Supp.2d 1282, 1292 n.25 (M.D. Fla. 2005) (citing *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 121 (1946) and *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88, 90 (1942)).

Under the first type of FLSA coverage – "individual coverage" – an employee is entitled to time-and-a-half overtime pay as long as he or she is "engaged in commerce or in the production of goods for commerce." *See* 29 U.S.C. § 207. To determine whether an employee performed such work, a court must focus its inquiry on the activities of the employee and not on the business of the employer. *See Mitchell v. Lublin McGaughy & Assocs.*, 358 U.S. 207, 211 (1959); *see also Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1267-68 (11th Cir. 2006). In *Thorne*, the Eleventh Circuit held that it was "the intent of Congress to regulate only activities constituting interstate commerce, not activities merely affecting commerce", and thus an employee must be "engaged in commerce", which means he must be "directly participating in the actual movement of persons or things in interstate commerce". *Thorne*, 448 F.3d at 1266. Further, in addition to the requirement that the individual must be directly participating in the actual movement of persons or things in interstate commerce, "[f]or an employee to be engaged in commerce,

'a substantial part of the employee's work must be related to interstate commerce.'" *Kitchings*, 393 F.Supp.2d at 1293 n.26 (quoting *Boekemeier v. Fourth Universalist Soc'y in City of New York*, 86 F.Supp.2d 280, 287 (S.D. N.Y. 2000) and (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 572 (1943)).

The second type of FLSA coverage – "enterprise coverage" – does not apply, because, as stated above, the lack of enterprise coverage has been conceded by the Petitioner.

The Petitioner lodges the following arguments concerning why the Opinion should be reversed: 1) the unpublished *Alonso*[1] case, which does not contain a facts section; 2) the term "engaged in commerce" should be given a broad, liberal construction"; 3) the *Marshall* case requires the conclusion that no *de minimis* rule applies; 4) the Petitioner fails to distinguish the *Thorne* or *McLeod* cases, but argues in contravention to them that the ultimate consumers of the retail goods were the Defendants' customers and not the Defendants, and the Petitioner handled and picked up goods that were previously in interstate commerce; and 5) cases from the Tenth Circuit and Eastern District of Arkansas, and the former Fifth Circuit's *Tilbury*[2] case require reversal. The Petitioner's arguments, none of which has any merit, will be discussed in turn.

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[1] *Alonso v. Dolphin Exterminating Co.*, 2005 WL 1901682 (11th Cir. 2005).

[2] *Tilbury v. Mitchell*, 123 F.Supp. 109 (W.D. La. 1954).

The *Alonso* Case is Not Applicable, and Was Overruled by *Thorne*

Petitioner has relied on *Alonso v. Dolphin Exterminating Co.*, 2005 WL 1901682, *1 (11th Cir. 2005), but that decision is not supportive of individual coverage in the circumstances presented by this case. *Alonso* contains no discussion of the facts, much less any analysis of them, whatsoever, but merely holds that a "laborer transporting fumigation materials and chemicals, which had traveled in interstate commerce to defendants' customers within the state", presented an issue of fact preventing summary judgment on the question of whether the plaintiff was engaged in interstate commerce.[3] The Middle District of Florida's

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[3] The *Alonso* opinion, in pertinent part, states as follows, in holding the plaintiff was:

> 'engaged in commerce' through his duties as a laborer transporting fumigation materials and chemicals, which had traveled in interstate commerce to defendants' customers within the state. Although these duties required no transportation outside the state of Florida, the materials and chemicals, which had traveled in interstate commerce, continued to flow in interstate commerce until they reached Dolphin Exterminating Company's customers. *See* [*Brennan v. Wilson Bldg., Inc.*, 478 F.2d 1090 (5th Cir.1973)] at 1095 (holding elevator operators [to be] 'engaged in commerce' because the goods they transported continue to flow in interstate commerce until delivered to the tenants of the building).

Alonso v. Dolphin Exterminating Co., 2005 WL 1901682 (11th Cir. 2005).

decision in *Junkin*[4] explains the problems with *Alonso*, concerning relying on it to argue that it applies to a case where retail goods are handled. The plaintiff in *Junkin* worked for a lawn maintenance company and his work required him to transport herbicides and fertilizers manufactured or shipped out of state. *Junkin*, 2005 WL 2862079 at *1. The court found that there was no enterprise coverage because the employer's annual volume of business did not exceed $500,000, *id.* at *3, and there was no individual coverage because the mere act of transporting goods that previously found themselves in the flow of interstate commerce does not mean that an employee engaged in commerce or produced goods or services for commerce. The court noted that "[b]rought to its logical end, such a theory would mean that an employee who, in the course of his duties, simply moves an item (which originated in another state) from one place to another within the same property . . . has 'engaged in commerce' by 'transporting' that item. Such a theory cannot stand, as it would, in essence, nullify the 'interstate' requirement and ultimately render the Commerce Clause meaningless." *Id.* at *4. As for the persuasiveness or lack thereof of the *Alonso* decision, it was deemed not persuasive because of its failure to provide a factual background and because, "[a]s an unpublished opinion, under Eleventh Circuit Rule 36-2, *Alonso* is not binding precedent and is, at best,

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[4] *Junkin v. Emerald Lawn Maintenance and Landscaping, Inc.*, 2008 WL 2862079 (M.D. Fla. 2005).

persuasive authority.[5] However, given the fact that the court there relied on undisclosed facts in the record, the Court does not find them to be persuasive here." *Id.* at *4 n.6.

Moreover, the Eleventh Circuit's subsequent decision in *Thorne* explaining that activities do not constitute "engaging in commerce" simply because the employer purchased goods which had previously moved in interstate commerce, *Thorne*, 448 F.3d at 1268, completely eclipses the applicability of the reasoning used by the court in *Alonso*. *Thorne's* determination that, "[w]hen goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further *intrastate*

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[5] Under Local Rule 36-2, the Eleventh Circuit makes clear that "[u]npublished opinions are not considered binding precedent." 11th Cir. R. 36-2. The Eleventh Circuit clarifies that "[a]lthough unpublished opinions may be cited as persuasive authority, they are not considered binding precedent. *Reliance on unpublished opinions is not favored by the court.*" 11th Cir. R. 36-2, I.O.P.-6 (emphasis added). The Local Rules further explain that "[t]he court may cite [unpublished opinions] where they are specifically relevant to determine whether the predicates for *res judicata*, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case." 11th Cir. R. 36-2, I.O.P.-7. Thus, the Eleventh Circuit contemplates the limited use of its unpublished opinions for specific cases, but clearly frowns upon reliance on unpublished opinions when they are not "specifically relevant" to a particular case. The Defendants request that the Court find that the *Alonso* opinion is not binding and that it is not persuasive authority, since it has been superseded by *Thorne*. *See Guzman v. Irmadan, Inc.*, 551 F.Supp.2d 1368 (S.D. Fla. 2008) (acknowledging *Thorne* supersedes *Alonso*).

movement of the goods are not covered under the [FLSA]", *id.* at 1267 (emphasis in original), cannot be reconciled with the reported *Alonso* decision; the *Thorne* court clearly distinguished and rejected *Alonso*, to the extent it purports to hold if an employee merely handles goods that at one time traveled interstate that employee is entitled to invoke individual coverage. *See also Russell v. Continental Restaurant, Inc.*, 430 F.Supp.2d 521, 526 (D. Md. 2006) (granting motion to dismiss for lack of subject matter jurisdiction and citing *Thorne* for the proposition that there is no individual coverage for employees "who handle goods after an employer acquires the goods for local disposition"). Even before *Thorne*, other courts had reached the same conclusion. *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1095 (5th Cir. 1973) (citing *Walling v. Jacksonville Paper Co.*, 317 U.S. at 567) (noting that the *Jacksonville Paper* "Court ruled that the interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce until they reached their final destination – the retail stores"); *Rivera v. Heights Landscaping, Inc.*, 2004 WL 434214 *4 (N.D. Ill. 2004) (holding that "'mere use, physical touching, or consumption of goods' that have traveled in interstate commerce is not enough [to establish individual coverage]" and "Plaintiffs cannot establish individual coverage merely by showing that in the course of their work they used rakes, fertilizers, or other goods that originated out of state"). Importantly, *Thorne* relied on *McLeod* for its holding.

Where an employer is the "ultimate consumer" of the goods that have moved in interstate commerce, the journey of those goods through interstate commerce is at an end. The relevant statutory language of the FLSA is as follows:

> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but *does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof* other than a producer, manufacturer, or processor thereof.

29 U.S.C. § 203(i) (emphasis added). In a case on point, a defendant-employer was found to be the "ultimate consumer" of "the gas and other petroleum products, tires and mechanical parts used in operating and maintaining defendants' trucks and other machines . . . which renders [the employees using those materials and products] excepted from [individual] coverage." *Marshall v. Whitehead*, 463 F.Supp. 1329, 1341 (M.D. Fla. 1978). The *Whitehead* court based its decision on *Dunlop v. Industrial America Corp.*, 516 F.2d 498 (5th Cir. 1975), finding that "the use of such products by the defendants' employees in the course of its business makes the defendants the 'ultimate consumers' of such goods within the meaning of Section 3(i) and renders them excepted from coverage under Section 3(s) on this ground." *Whitehead*, 463 F.Supp. at 1341. In this case, Petitioner

did not pass on (for sale) any oil filters, oil, air filters, and the like to customers of the Respondents. Rather, just as in *Whitehead*, these materials ended their journey through interstate commerce once they reached the Respondents' supplier's place of business (the retailers, such as Bennett Auto). For the reasons addressed herein, the Respondents request that the Court hold that the Petitioner has not met his burden to establish individual coverage, and not grant *certiorari*.

"Engaged in Commerce" Is Somewhat Limited

Under individual coverage jurisprudence, "commerce" and "interstate commerce" are narrower terms of art than in other areas of Commerce Clause jurisprudence. As this Court has clarified, in enacting the FLSA, Congress did not intend to exercise the full extent of its constitutional regulatory powers, and clearly intended to exempt local businesses:

> [W]e cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states. [citations omitted]. Moreover as we stated in *Kirschbaum Co. v. Walling* [citations omitted], Congress did not exercise in this Act the full scope of the commerce power.

Walling v. Jacksonville Paper Co., 317 U.S. 564, 571 (1943). Further, because the FLSA manifests the "concern of Congress to avoid undue displacement of

state regulation of activities of a dominantly local character . . . [t]he focus of coverage became 'commerce', not in the broadest constitutional sense, but in the limited sense of Section 3(b) of [the FLSA, 29 U.S.C. § 203(b)]: 'trade, commerce, transportation, transmission, or communication among the several States. . . .'" *Marshall v. Whitehead*, 463 F.Supp. 1329, 1345 (M.D. Fla. 1978) (citing *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 315 (1960)). Further, the following language from this Court shows why workers like the Petitioner who handle goods purchased from a retailer are not "engaged in commerce", and thus are not entitled to invoke individual coverage under the FLSA:

> [i]n the Fair Labor Standards Act, 29 U.S.C.A. s 201 *et seq.*, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. . . . So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not.

McLeod v. Threlkeld, 319 U.S. 491, 493 (1943). The corporate Defendant is a purely local, one-location, mom-and-pop auto repair shop with annual gross sales of less than $500,000. This is exactly the sort of local business Congress, in enacting the FLSA, intended to leave to the regulation of the several states. *Jacksonville Paper Co.,* 317 U.S. at 571.

The *Marshall* Case is Inapposite

The Petitioner relies on *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122 (5th Cir. 1979). That case is not applicable, because the employees were involved in regular and recurrent transportation of individuals engaged in interstate travel, as follows:

> The evidence before the district court clearly established that transporting persons making international journeys was a regular, recurring, and substantial part of the work of defendants' employees in the operation of all of their routes. Because their work was entwined with a continuous stream of international travel, they were engaged in commerce within the meaning of the Act.

Id. at 1125. The court in *Thorne* made clear that employees who purchase goods at a retail store (even if the goods traveled interstate) are not engaged in commerce for purposes of individual coverage (unlike the employees in *Victoria Transp. Co.*), as follows:

> When goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state [sic] movement of the goods are not covered under the Act. *McLeod*, 319 U.S. at 493, 63 S. Ct. 1248. Courts distinguish between merchants who bring commerce across state lines for sale and the ultimate consumer, who merely purchases goods that previously moved in interstate commerce for intrastate use. Therefore, a customer who purchases an item from Home Depot is not

> engaged in commerce even if Home Depot previously purchased it from out-of-state workers.

Thorne, 448 F.3d at 1267. This slams the door on any argument by the Petitioner that he was engaged in interstate commerce for purposes of individual coverage. Even if he purchased the items, he still would not be entitled to individual coverage. As the district court explained:

> As the Supreme Court has stated, Congress did not intend to exercise the full scope of its power under the Commerce Clause in [enacting] the FLSA. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 570-71, 63 S. Ct. 332, 87 L.Ed. 460 (1943). Therefore, to establish individual coverage, [the plaintiff], must show that he was engaged in 'the actual movement of persons or things in interstate commerce.' *See Thorne*, 448 F.3d at 1266.

Navarro, 533 F.Supp.2d at 1223. Accordingly, nothing in *Victoria Transp. Co.* requires the conclusion that reversal is warranted.

The *Thorne* Case is Not Distinguishable

One of the Petitioner's arguments is that in his affidavit he indicates he picked up materials at least once per week at various retail stores. The Petitioner described how these stores were Bennett Auto, Advance Auto, and similar retailers. *Id.* The Plaintiff's argument has been rejected by this Court and the

courts of appeals, as set forth above. The court in *Thorne* made clear that even employees who purchase goods at a retail store (even if the goods traveled interstate) are not engaged in commerce for purposes of individual coverage, as follows:

> When goods reach the customer for whom they were intended, the interstate journey ends and employees engaged in any further intra state [sic] movement of the goods are not covered under the Act. *McLeod*, 319 U.S. at 493, 63 S. Ct. 1248. Courts distinguish between merchants who bring commerce across state lines for sale and the ultimate consumer, who merely purchases goods that previously moved in interstate commerce for intrastate use. Therefore, a customer who purchases an item from Home Depot is not engaged in commerce even if Home Depot previously purchased it from out-of-state workers.

Thorne, 448 F.3d at 1267. This slams the door on any argument by the Petitioner that he was engaged in interstate commerce for purposes of individual coverage. Even if he purchased the items (which he did not), he still would not be entitled to invoke individual coverage. As stated above, the courts have held that the ultimate consumer of the retail goods is the individual who purchases them, and not the individual who happens to own a car or home into which those goods are installed.

The Cases from Other Circuits and *Tilbury* Are Not Controlling

On page 8, the Petitioner cites to a case from the Tenth Circuit and a case from the Eastern District of Arkansas. Those cases do not eclipse the clear line of cases from this Court which set forth the pertinent rubrics concerning individual coverage. The foregoing requires denial of the Petition.

Further, the Petitioner relies on *Tilbury* from the former Fifth Circuit, but that case does not help him for several reasons. First, the *Tilbury* decision notes that workers who unpacked shipments of meat were not engaged in commerce, because "the shipments had completed their interstate journey when they came to rest on defendant's storage room floor". *Tilbury v. Mitchell*, 123 F.Supp. 109, 112 (W.D. La. 1954). Second, the group of employees who the Court found were subject to the FLSA, were butchers and boners who regularly and necessarily in the course of their employment handled or otherwise worked upon these meats which then were immediately placed in interstate commerce, and thus the court held that the employees were "engaged in the production of goods for commerce", which is not an argument that the Petitioner has espoused in this Petition – the Petitioner has argued that he was "engaged in commerce", but not that he was engaged in the production of goods for commerce, and so any such argument to the contrary has been waived by the Petitioner. *Id.*

Concerning the Petitioner's argument that the *de minimis* rule applies, that rule, as explained in *Tilbury*, is that even if the percentage of the employer's business dedicated to the production of goods for commerce is very small (seemingly "*de minimis*"), it is not *de minimis* for purposes of individual coverage, meaning that as long as workers were regularly and recurrently engaged in the production of goods for commerce, the court was not going to hold that such employees were not entitled to individual coverage under the theory that the employer's overall involvement in the production of goods for commerce (because of the nature of its business) was otherwise very low. *Id.* at 112-13. The *Tilbury* decision does not require that the Petition be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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